

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

10 IRMA RIVERA O/B/O J.R., ) Case No. ED CV 10-149-PJW

11 Plaintiff.)

Case No. ED CV 10-149-PJW

13 MICHAEL J. ASTRUE. )

15 MICHAEL J. ASTREY,  
COMMISSIONER OF THE )

14 COMMISSIONER OF THE  
SOCIAL SECURITY ADMINISTRATION.

Defendant )  
15 )

MEMORANDUM OPINION AND ORDER

## I. INTRODUCTION

Plaintiff Irma Rivera, on behalf of her minor son, J.R., appeals a decision by Defendant Social Security Administration ("the Agency"), denying her application for Supplemental Security Income ("SSI"). She claims that the Administrative Law Judge ("ALJ") erred when he: (1) failed to comply with an Appeals Council remand order requiring him to obtain a psychological evaluation; (2) determined that J.R. was not credible; and (3) failed to consider the side effects of J.R.'s medication in determining whether he was disabled. (Joint Stip. at 3.) For the reasons explained below, the appeal is denied and the action is dismissed with prejudice.

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## II. SUMMARY OF PROCEEDINGS

In October 2006, Plaintiff applied for SSI on behalf of J.R., her then-11-year-old son, alleging that he had been disabled since May 2001, due to depression and schizophrenia. (Administrative Record ("AR") 177-79, 203-30.) The Agency denied the application initially and on reconsideration. (AR 65-66, 85-93.) Plaintiff then requested and was granted a hearing before an ALJ. On November 18, 2008, Plaintiff and J.R. appeared without counsel at the hearing. (AR 44-55.) On January 29, 2009, the ALJ issued a decision denying benefits. (AR 73-84.) Plaintiff appealed to the Appeals Council, which remanded the case to the ALJ for further proceedings. (AR 126-27.) After remand, the ALJ held another hearing (AR 27-43), and, on October 20, 2009, issued a second decision, again denying Plaintiff's claim for benefits. (AR 12-26.) Plaintiff appealed to the Appeals Council, which denied review. (AR 1-3.) She then commenced the instant action.

### III. ANALYSIS

A. The ALJ's Failure to Adhere to the Appeal's Council's Remand Order

20 Plaintiff complains that the ALJ failed to follow the Appeals  
21 Council's remand order because he did not obtain a qualifying  
22 psychological evaluation, as ordered. For the following reasons, this  
23 claim is rejected.

24 Following the ALJ's initial decision denying benefits, Plaintiff  
25 appealed to the Appeals Council. The Appeals Council concluded that  
26 the ALJ had erred and remanded the case back to the ALJ to, among  
27 other things:

1       Obtain additional evidence concerning all of the claimant's  
2       mental impairments in order to complete the administrative  
3       record in accordance with the regulatory standards regarding  
4       consultative examinations and existing medical evidence (20  
5       CFR 416.912-913). The additional evidence will include a  
6       psychological consultative examination with psychological  
7       testing and a statement regarding the claimant's impairments  
8       and any resulting functional limitations. Evaluate the  
9       mental impairments in accordance with the six domains of  
10      functioning used for school-age children (age 6 to  
11      attainment of age 12), and for adolescents (age 12 to  
12      attainment of age 18) (20 CFR 416.926a).

13 (AR 127.)

14       In response, the ALJ ordered a consultative examination by  
15      psychologist Douglas W. Larson. (AR 302-07.) In addition to  
16      reviewing the records and examining J.R., Dr. Larson administered  
17      three, age-appropriate diagnostic tests on J.R. (AR 304-06.) Dr.  
18      Larson determined that J.R. was moderately impaired in five of six  
19      areas of functioning. (AR 306.) Inexplicably, however, though J.R.  
20      was 13 years old at the time, Dr. Larson characterized J.R.'s  
21      limitations in terms of ability to perform in the workplace, i.e., to  
22      interact appropriately with supervisors, comply with job rules,  
23      respond to change in a workplace setting, and maintain persistence in  
24      a workplace setting. (AR 306.) The ALJ and the medical expert  
25      recognized this error and discounted Dr. Larson's findings, in part,  
26      for that reason. (AR 19, 34-36.)

27       Plaintiff argues that the ALJ's rejection of Dr. Larson's  
28      evaluation because it was couched in terms of ability to function in

1 the workplace was tantamount to not having a psychological evaluation  
2 at all, contrary to the remand order of the Appeals Council. (Joint  
3 Stip. at 4-5.) She argues that this error requires automatic reversal  
4 because ALJs are required to follow the remand orders of the Appeals  
5 Council, citing *Ruiz v. Apfel*, 24 F.Supp.2d 1045, 1050 (C.D. Cal.  
6 1998) and various regulations.

7 The Agency argues that the ALJ did follow the Appeals Council  
8 remand order and that, even if he didn't, his decision should be  
9 affirmed because this Court is not authorized to consider whether ALJs  
10 follow the dictates of Appeals Council remand orders. For the  
11 following reasons, the Court sides with the Agency.

12 The Court has a limited role in reviewing Agency decisions. It  
13 is tasked with determining whether the final decision of the Agency is  
14 supported by substantial evidence and is not based on legal error.  
15 See 42 U.S.C. § 405(g); *Tyler v. Astrue*, 305 Fed. Appx. 331, 332 (9th  
16 Cir. 2008); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989).  
17 In *Tyler*, an unpublished 2008 decision, the Ninth Circuit explained in  
18 a case closely on point:

19 The district court properly declined to evaluate whether the  
20 ALJ's second decision satisfied the demands of the Appeals  
21 Council's remand . . . . [F]ederal courts only have  
22 jurisdiction to review the final decisions of administrative  
23 agencies. When the Appeals Council denied review of the  
24 ALJ's second decision, it made that decision final, and  
25 declined to find that the ALJ had not complied with its  
26 remand instructions.

27 *Id.* at 332.

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1       Thus, whether the ALJ followed the Appeals Council's remand or  
2 not is not properly before this Court. As such, Plaintiff's claim  
3 here is rejected.

4       Further, even assuming that this issue was properly before the  
5 Court and, assuming further that the Court agreed with Plaintiff that  
6 the ALJ was bound to follow the Appeals Council's remand order, it  
7 would conclude based on this record that the ALJ substantially  
8 complied with that order. He referred J.R. to a psychologist who  
9 performed a battery of tests on J.R. (AR 302-07.) These tests were  
10 aimed at identifying and analyzing J.R.'s problems. In fact, they  
11 did. Dr. Larson concluded that J.R. was moderately impaired in five  
12 of six areas of functioning. (AR 306.) Though Dr. Larson described  
13 J.R.'s limitations in terms of work capabilities, that fact alone does  
14 not diminish his evaluation.

15      Finally, the Court's conclusion that the ALJ followed the remand  
16 order is circumstantially bolstered by the fact that, when Plaintiff  
17 appealed the ALJ's second decision, the Appeals Council denied review.  
18 Certainly, an inference can be drawn that the Appeals Council did not  
19 believe that the ALJ failed to follow its remand order since it denied  
20 review. For these reasons, Plaintiff's claim that the ALJ's decision  
21 should be reversed because he failed to follow the Appeals Council's  
22 remand order is denied.<sup>1</sup>

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27      <sup>1</sup> The ALJ was not required by the remand order to simply adopt  
28 Dr. Larson's opinion. The ALJ set forth reasons why he discounted Dr.  
Larson's opinion, which Plaintiff does not really challenge here.

1           B.     The ALJ's Credibility Determination

2       Plaintiff contends that the ALJ erred when he concluded that J.R.  
3 was not credible. (Joint Stip. at 10-13.) For the following reasons,  
4 the Court disagrees.

5       ALJs are tasked with judging the credibility of witnesses.  
6 Where, as here, a claimant has produced objective medical evidence of  
7 an impairment which could reasonably be expected to produce the  
8 symptoms alleged, the ALJ "may not discredit the claimant's testimony  
9 as to subjective symptoms merely because they are unsupported by  
10 objective evidence." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.  
11 1998); *Fair v. Bowen*, 885 F.2d 597, 601-03 (9th Cir. 1983). If there  
12 is no evidence of malingering, the ALJ may only reject the claimant's  
13 testimony for "specific, clear, and convincing reasons." *Smolen v.*  
14 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). These reasons must be  
15 supported by substantial evidence in the record. *Thomas v. Barnhart*,  
16 278 F.3d 947, 959 (9th Cir. 2002). In evaluating a claimant's  
17 credibility, an ALJ is free to consider many factors, including  
18 "ordinary techniques of credibility evaluation[,]. . . prior  
19 inconsistent statements[,]. . . and the claimant's daily activities."  
20 *Smolen*, 80 F.3d at 1284. "General findings are insufficient; rather  
21 the ALJ must identify what testimony is not credible and what evidence  
22 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

23       Over the course of two administrative hearings, J.R. testified  
24 about his ability to function at school and at home. (AR 46-51, 37,  
25 40.) The gist of his testimony was that he was doing fairly well in  
26 school and in life outside school, though, at times, he had problems,  
27 including having (bathroom) accidents four or five times a year  
28 outside of school. (AR 40.) The ALJ determined that J.R.'s testimony

1 was not completely credible. (AR 17.) Plaintiff argues that this  
2 finding was contained in only two sentences of the ALJ's decision and  
3 was based on the vaguest of reasons, like the fact that J.R.'s  
4 symptoms improved significantly once he started taking his psycho-  
5 tropic medications and undergoing therapy. (Joint Stip. at 11-12.)  
6 The Court disagrees. The ALJ's justification for discounting J.R.'s  
7 testimony is contained in a fairly lengthy paragraph at page 17 of the  
8 administrative record and sets forth numerous reasons why J.R.'s  
9 testimony that he was limited in certain ways was not believable.  
10 These reasons included: according to J.R.'s mother and his doctors,  
11 J.R.'s condition had vastly improved with drugs and therapy; J.R. was  
12 attending school and doing well there, earning 3s and 4s on a 4-point  
13 scale in his course work; and J.R. was participating in normal  
14 activities when not in class. (AR 17.) These reasons are specific,  
15 clear, and convincing and are supported by the record. Further, they  
16 are valid reasons for discounting a claimant's credibility. See  
17 *Smolen*, 80 F.3d at 1284. As such, the ALJ's credibility finding will  
18 be upheld.

19       C. Medication Side Effects

20       At the first administrative hearing, J.R. testified that one of  
21 the medications that he was taking, Abilify, made him sleepy and  
22 interfered with his ability to concentrate in school. (AR 50-51.)  
23 The ALJ failed to mention this in his decision. Plaintiff argues that  
24 this was error and requires that the Court remand the case to the  
25 Agency to allow the ALJ to consider the side effects. (Joint Stip. at  
26 17.) For the following reasons, the Court concludes that remand on  
27 this issue is not required.

1       Though the Court would agree that the ALJ should have mentioned  
2 J.R.'s testimony that his medication made him sleepy and interfered  
3 with his ability to concentrate in school, see Social Security Ruling  
4 96-7p, the Court does not agree that remand is necessary here. To  
5 begin with, the ALJ found that J.R. was not credible, a finding this  
6 Court has upheld. Certainly, where, as here, the claimant is found to  
7 be not credible and the sole basis for his claim that he suffers from  
8 medication side effects is a passing mention in his testimony, the ALJ  
9 is not required to accept that testimony. See, e.g., *Thomas*, 278 F.3d  
10 at 960 (affirming ALJ's rejection of claimant's alleged side effects  
11 because claimant was not credible and the only evidence of side  
12 effects were her statements that they existed); and *Osenbrock v.*  
13 *Apfel*, 240 F.3d 1157, 1164 (9th Cir. 2001) (holding ALJ did not err in  
14 excluding alleged side effects from hypothetical question where the  
15 record contained only "passing mentions of the side effects of  
16 [claimant's] medication . . . but there was no evidence of side  
17 effects severe enough to interfere with [claimant's] ability to  
18 work"). Further, J.R.'s claim at the hearing that he was suffering  
19 from side effects was contradicted by his numerous statements to his  
20 doctors to the contrary. As the Agency pointed out in the brief, over  
21 the course of his treatment, J.R. reported to his doctors 16 times  
22 that he was not experiencing any side effects from his medication.  
23 Finally, as J.R. explained, he was doing well in school, earning 3s  
24 and 4s in his classes, and was doing well outside school, too. This  
25 evidence further suggests that any side effects, real or imagined,  
26 were not so critical as to have any impact on the ALJ's disability  
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1 determination. Thus, remand on this issue is not warranted because  
2 any error by the ALJ was harmless.<sup>2</sup>

3                          IV. CONCLUSION

4                          For the reasons set forth above, the Court concludes that the  
5 Agency's decision denying benefits is supported by substantial  
6 evidence and is not based on legal error. The decision is, therefore,  
7 affirmed and the action is dismissed with prejudice.

8                          IT IS SO ORDERED.

9                          Dated: July 8, 2011

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12                         PATRICK J. WALSH  
13                         UNITED STATES MAGISTRATE JUDGE

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25                         <sup>2</sup> Plaintiff's citation to WebMD and her argument that Abilify  
26 can cause numerous side effects, including drowsiness, is not on  
27 point. (Joint Stip. at 17.) The issue is not what side effects the  
28 medicine could cause, but what side effects it did cause. A fair  
reading of this record establishes that it did not cause any side  
effects in J.R.